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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 KIRK PATRICK VAUGHT, JR.,

12 Plaintiff,

13  
14 vs.

15 JAMES A. YATES, Warden,

16 Defendant.

**CASE NO. 07-CV-1225-H (CAB)**

**ORDER DENYING MOTION FOR  
RECONSIDERATION**

17 On September 10, 2008, the Court entered judgment adopting the Report and  
18 Recommendation ("R&R") denying the petition for writ of habeas corpus brought pursuant to  
19 28 U.S.C. § 2254 by Petitioner Kirk Patrick Vaught, Jr. (Doc. No. 24.) On October 6, 2008,  
20 Petitioner filed a notice of appeal and indicated in an accompanying letter that he did not  
21 receive a copy of the R&R prior to its adoption and that he had prejudicially missed his  
22 opportunity to make objections to the R&R. (Doc. Nos. 26, 31.) On October 14, 2008, for  
23 good cause shown, the Court granted Petitioner an opportunity to respond to the order adopting  
24 the R&R. (Doc. No. 27.) The Court further ordered that Petitioner's response be construed as  
25 a motion for reconsideration. Id. On November 11, 2008, Petitioner filed objections to the  
26 R&R. (Doc. No. 40.)

27 For the reasons stated below, the Court DENIES Petitioner's motion for reconsideration  
28 and DENIES Petitioner's objections to the R&R.

## **Background**

### **A. Procedural History**

On April 19, 2004, a San Diego County Superior Court jury found Petitioner guilty of two counts of robbery, one count of possession of a firearm by a felon, and one count of burglary. (Clerk's Transcript ("CT") at 185-91.) The jury also found true the allegation that Petitioner personally used a firearm during the commission of the robbery. (CT at 186, 188.) On November 30, 2004, Petitioner was sentenced to a state custody term of 18 years. (CT at 201.) Petitioner's sentence included the applicable enhancements for personal use of a firearm during the commission of a robbery. *Id.* On May 1, 2006, the California Court of Appeal affirmed Petitioner's convictions and found that the prosecution had presented at trial sufficient evidence to prove that Petitioner possessed and used a firearm during the commission of the robbery. (Lodgment 5 at 1.) On July 17, 2006, the California Supreme Court denied a petition for review. (Lodgment 7 at 1.) On July 7, 2008, Petitioner filed with this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) On November 7, 2007, Respondent filed an answer. (Doc. No. 13.) On January 1, 2008, Petitioner filed a traverse. (Doc. No. 22.) On May 5, 2008, the magistrate judge issued an R&R recommending that the petition be denied. (Doc. No. 23.) On September 10, 2008, the Court reviewed the entire record and issued an order denying the habeas petition. (Doc. No. 24.)

### **B. Factual History**

The state appellate court summarized the relevant facts as follows:

At approximately 7:00 p.m. on September 28, 2003, two employees were working at the Aaron Brothers store located on Midway Drive in San Diego. The assistant manager, Jill Bautista, was helping Geoffrey Moon complete the final orders for the night. When Bautista opened the store's back door to ensure it was locked, she was approached by a woman who asked to make a return of merchandise. Bautista explained the store was closed and she could not complete the merchandise's return until the next day. Vaught appeared from behind the door and told Bautista he was robbing the store. When Vaught held a gun to

1       Bautista's chest, she admitted Vaught and the woman into the store.

2               Bautista immediately walked to the room in which Moon was working.  
3       Vaught followed Bautista. Bautista told Moon that Vaught was there to “take our  
4       money.” Moon noticed Vaught had a gun pointed at Bautista. Bautista then lead  
5       [sic] Vaught to the office, where money was kept in a safe. Vaught waved the  
6       gun at Moon, directing him to follow.

7               After unlocking the office door, Bautista entered the office, followed by  
8       Moon and Vaught. Bautista opened the safe and handed Vaught the cash from  
9       the cash drawers. Vaught stuffed the money in his pockets. At this time, the gun  
10      was either in his hand or his waistband, and was still visible to Bautista and  
11      Moon. When Vaught insisted there was more money in the safe, Moon handed  
12      over two pouches containing the daily deposits. Vaught asked Bautista and  
13      Moon to give him time to get away, and he and the woman left the store. No gun  
14      used in the robberies was ever recovered; the existence of a gun was based solely  
15      on the testimonies of Bautista and Moon.

16 (Lodgment 5 at 2-3.)

17       As noted in the Court’s order denying the petition for writ of habeas corpus, the two  
18 robbery victims, Bautista and Moon, both testified at trial that Petitioner possessed and  
19 personally used a gun during the robbery. (Doc. No. 23; Reporter’s Transcript (“RT”) at  
20 128, 213.) Bautista testified that Petitioner pulled a gun out of his waistband and put it to  
21 her chest. (RT at 213-16.) When he pointed the gun at her chest, Petitioner told her “it  
22 wasn’t a joke and that he was here to take [Aaron Brothers’] money.” (RT at 216.)  
23 Although Bautista’s initial reaction was that the gun looked like the kind of gun “you play  
24 with when you’re a kid,” she testified she complied with Petitioner’s demands because she  
25 thought the gun was real and loaded. (RT at 215, 225.) She could not remember the exact  
26 details of the gun, only that it was “long and pointy.” (RT at 215.)

27       Moon testified that Petitioner had the gun in his left hand and was pointing it at  
28 Bautista. (RT at 128.) Moon stated he had previously handled a gun and described the

1 difference between a revolver and a semi-automatic pistol. (RT at 129.) He testified the  
 2 gun was a dark metal revolver with a long barrel, approximately nine to ten inches long.  
 3 (RT at 129.) Moon also testified that the barrel appeared to be consistent in color and there  
 4 were no red or orange markings at the end of the barrel. (RT at 129-30.)

### 5 **C. Motion for Reconsideration and Objections to the R&R**

6 On October 6, 2008, Petitioner filed a notice of appeal and indicated in an  
 7 accompanying letter to the Court that he did not receive a copy of the R&R prior to its  
 8 adoption and that he had prejudicially missed his opportunity to make objections to the  
 9 R&R. (Doc Nos. 26, 27.) On October 14, 2008, for good cause shown, the Court granted  
 10 Petitioner an opportunity to respond with objections to the order adopting the R&R. (Doc.  
 11 No. 27.) The Court further ordered that Petitioner's response be construed as a motion for  
 12 reconsideration. Id. On November 11, 2008, Petitioner filed objections to the R&R. (Doc.  
 13 No. 40.)

### 14 **Discussion**

15 Petitioner's motion and objections merely repeat the arguments raised in his original  
 16 §2254 petition and traverse. (Doc Nos. 1, 2, 40.) In his motion and objections, Petitioner  
 17 argues that the evidence presented at trial was insufficient to support his conviction for being  
 18 a felon in possession of a firearm under Cal. Penal Code § 12021(a)(1) and insufficient for the  
 19 imposition of sentence enhancements for the personal use of a firearm during the commission  
 20 of a robbery under Cal. Penal Code § 12022.53(b). (Doc. No. 40.) The Court considers his  
 21 motion for reconsideration and his objections to the R&R.

### 22 **A. Standard of Review for Objections to an R&R and Relief Under Rule 60(b)**

23 A district court "may accept, reject, or modify, in whole or in part, the findings or  
 24 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party objects to any  
 25 portion of the report, the district court "shall make a de novo determination of those portions  
 26 of the report . . . to which objection is made." Id.

27 A motion for reconsideration of a final order is governed by Rule 60(b) of the Federal  
 28 Rules of Civil Procedure. Fed. R. Civ. P. 60(b). Rule 60(b) provides that a court may relieve

1 a party from a final judgment, order, or proceeding for the following reasons:

- 2 (1) mistake, inadvertence, surprise, or excusable neglect;
- 3 (2) newly discovered evidence that, with reasonable diligence, could not have been
- 4 discovered in time to move for a new trial;
- 5 (3) fraud, misrepresentation, or misconduct by the opposing party;
- 6 (4) the judgment is void;
- 7 (5) the judgment has been satisfied, released or discharged, is based on an earlier
- 8 judgment that has been reversed or vacated, or is no longer equitable; or
- 9 (6) any other reason that justifies relief.

10 Fed. R. Civ. P. 60(b).

11 Rule 60(b)(6) is a “catch-all provision” that allows a court to vacate a judgment “for any  
 12 other reason justifying relief.” Lehman v. U.S., 154 F.3d 1010, 1017 (9th Circuit 1998). Relief  
 13 under Rule 60(b)(6) is only available when “the moving party is able to show both injury and  
 14 that circumstances beyond [his] control prevented timely action to protect [his] interests.”  
 15 United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Circuit 1993). While  
 16 Rule 60(b)(6) does not particularize any factors that must be met before relief is proper, courts  
 17 should use the Rule 60(b)(6) sparingly and only under “extraordinary circumstances.”  
 18 Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988). For example, Rule  
 19 60(b)(6) relief has been granted to a litigant against whom judgment was entered by a judge  
 20 who had improperly refused to recuse himself. Liljeberg, 486 U.S. at 863-65. Rule 60(b)(6)  
 21 has also been used to set aside a default judgment when the petitioner had been ill, incarcerated,  
 22 and without counsel for the four years following the judgment. Klapprott v. United States, 335  
 23 U.S. 601 (1949).

24 **B. Merits of Petitioner’s Motion for Reconsideration and Objections to the R&R**

25  
 26 Petitioner’s motion for reconsideration and objections merely repeat the arguments  
 27 raised in his §2254 petition and traverse. (Doc. Nos. 1, 22, 40.) Petitioner argues that the  
 28 evidence at trial was insufficient to support a finding that he used and possessed a firearm

1 during the robbery. (Doc. No. 40.) In light of Petitioner's objections and motion, the Court has  
2 reconsidered its order denying the §2254 petition.

3       The Court has considered Petitioner's objections under a de novo standard of review.  
4 Petitioner merely repeats the arguments made in his §2254 petition and traverse. For the reasons  
5 stated in the September 10, 2008 order denying the petition, the Court DENIES Petitioner's  
6 objections to the R&R.

7       Relief from the judgment under any of Rule 60(b) subsections (1) through (5) would be  
8 improper. Petitioner has not identified any excusable neglect, newly discovered evidence, or  
9 misconduct by the prosecution. Fed. R. Civ. P. 60(b)(1)-(3). Petitioner has not identified any  
10 reason to declare the judgment void or any intervening circumstances that render the judgment  
11 no longer equitable. Fed. R. Civ. P. 60(b)(4),(5).

12       Petitioner has also failed to identify "extraordinary circumstances" under which Rule  
13 60(b)(6) relief may be granted. Liljeberg, 486 U.S. at 864. Specifically, Petitioner has failed  
14 to identify an injury that he has suffered. See Alpine Land & Reservoir Co., 984 F.2d at 1049.  
15 The Court addressed Petitioner's arguments at length in its order denying the §2254 petition.  
16 The Court then permitted Petitioner to file objections to the R&R after he alleged that he did  
17 not receive a copy of the R&R prior to its adoption. The Court has now reconsidered  
18 Petitioner's arguments under a de novo standard, the required standard of review for objections  
19 to an R&R. 28 U.S.C. § 636(b)(1) (2005). After considering Petitioner's objections, the Court  
20 finds no reason to modify the September 10, 2008 order denying the petition. Accordingly, the  
21 Court DENIES Petitioner's motion for reconsideration.

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**Conclusion**

For the reasons stated above, and for the reasons stated in the September 10, 2008 order denying the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, the Court DENIES Petitioner's motion for reconsideration and DENIES Petitioner's objections to the R&R. The judgment entered on September 10, 2008, denying the §2254 petition remains in effect. The Court also DENIES a certificate of appealability for the motion for reconsideration.

IT IS SO ORDERED.

DATED: September 21, 2009

  
MARILYN L. HUFF, District Judge  
UNITED STATES DISTRICT COURT

COPIES TO:

All parties of record.